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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CONSTANCE CALLAN,

Plaintiff, Cross-defendant and
Appellant,

v.

CRC INSURANCE SERVICES, INC.,

Defendant, Cross-complainant and
Respondent;

TOM CURTIN et al.,

Defendants and Respondents.

B206505, B211059 & B213076

(Los Angeles County
Super. Ct. No. BC352682)

APPEAL from a judgment and orders of the Superior Court of Los Angeles,
Soussan G. Bruguera, Judge. Reversed with directions.

Blum Collins, Steven A. Blum and Gary Ho for Plaintiff, Cross-defendant and
Appellant.

Jones Day, Elwood G. Lui, Allison R. Michael and Brian M. Hoffstadt for
Defendant, Cross-complainant and Respondent.

Dal Soglio & Martens, Robin D. Dal Soglio and Daniel L. Martens for Defendant
and Respondent Tom Curtin.

Little Mendelson, Brandie N. Charles and Alecia W. Winfield for Defendant
and Respondent Chris Houska.

Constance Callan appeals an order dismissing her complaint against CRC Insurance Services, Inc. (CRC), Tom Curtin, and Chris Houska and striking her answer to CRC's cross-complaint as sanctions for misuse of the discovery process. Callan also appeals a default judgment entered against her on the cross-complaint, awarding CRC over \$2.3 million in damages and \$299,349 in attorney fees, and an order awarding the defendants over \$1.6 million in additional attorney fees. Callan contends she did not willfully fail to comply with any order compelling discovery and therefore cannot be subject to terminating sanctions. We conclude that Callan did not fail to comply with an order compelling her attendance and testimony at a deposition within the meaning of Code of Civil Procedure section 2025.450, subdivision (d) and that the terminating sanctions were unauthorized. We therefore will reverse the order imposing terminating sanctions, the default judgment, and the postjudgment order awarding attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background

CRC is a wholesale insurance broker. Callan was employed by CRC as an insurance broker from March 2000 until May 2006. Carl Wheaton and Chris Houska also were employed by CRC during the same time period. Curtin was CRC's chief executive officer.

Callan was a very successful insurance broker. She won CRC's Broker of the Year award in 2003, 2004, and 2005, based on her sales volume. CRC commenced an audit of her accounts in May 2006 and suspended her employment (according to Callan) or put her on paid leave (according to CRC) shortly thereafter.

2. *Complaint and Cross-Complaint*

Callan filed a complaint against CRC, Curtin, and Houska in May 2006, and filed her first amended complaint in July 2006. Callan alleges that CRC audited her and suspended her employment in retaliation for her complaints about sexual harassment and other misconduct by Houska and others. She alleges counts for (1) sexual harassment in violation of FEHA, against CRC and Houska; (2) retaliation in violation of FEHA, against CRC and Curtin; (3) sex discrimination in violation of FEHA, against CRC; (4) wrongful discipline in violation of public policy, against CRC; (5) wrongful constructive discharge, against CRC; and (6) breach of contract, against CRC.

CRC filed a cross-complaint against Callan and Wheaton in August 2006, and filed its first amended cross-complaint in December 2006. CRC alleges that Callan and Wheaton fabricated sales in December 2005 in order to win the Broker of the Year award and later failed to cooperate in the audit of Callan's accounts. CRC alleges counts for (1) breach of contract, against Callan and Wheaton; (2) breach of the implied covenant of good faith and fair dealing, against Callan and Wheaton; (3) breach of fiduciary duty, against Callan and Wheaton; (4) fraud, against Callan and Wheaton; (5) conversion, against Callan; (6) money had and received, against Callan; and (7) unfair competition (Bus. & Prof. Code, § 17200), against Callan and Wheaton.

3. *Discovery Requests and Discovery Motions*

Callan propounded her first set of special interrogatories, form interrogatories, document demands, and requests for admissions to CRC in June 2006. She propounded a second set of special interrogatories and document demands to CRC in August 2006.

CRC's responses contained numerous objections. Callan moved to compel further responses to her first and second sets of discovery.

CRC propounded its first set of form interrogatories and document demands on Callan pertaining to the complaint in August 2006 and propounded a second set of form interrogatories and document demands pertaining to the cross-complaint later that month.

CRC served a notice of deposition on Callan on September 13, 2006, setting her deposition for October 26, 2006. Callan's attorney responded with a letter stating that neither Callan nor her attorneys were available on the date set by CRC and that they therefore would not appear. CRC served an amended notice of deposition on Callan on October 3, 2006, setting her deposition for October 13, 2006. Callan served objections to the deposition notice, stating that she was unavailable on that date, that CRC had failed to consult her before setting the date, that she had "priority in discovery" because she had served her written discovery first, that her discovery motions were pending, and other objections. On October 13, 2006, CRC filed a motion to compel Callan's attendance and testimony at her deposition. CRC argued that Callan twice had refused to appear for her noticed deposition and that she had failed to provide dates when she would appear.

Callan and Wheaton served a notice of deposition on CRC on September 14, 2006, setting the deposition for October 6, 2006. The notice stated that the deposition would be taken of CRC's "Person(s) Most Knowledgeable" on several subjects and demanded the production of documents. CRC's attorney responded with a letter stating

that “we are unavailable to proceed with the deposition . . . unilaterally set by cross-defendants,” and that they therefore would not appear. CRC also served objections to the deposition notice on several grounds. Callan moved to compel the appearance by, testimony of, and production of documents by CRC’s most knowledgeable person.

4. *Initial Hearing on Discovery Motions and Motion to Appoint a Discovery Referee*

The various discovery motions came on for hearing on November 9, 2006. The trial court ordered the parties to meet and confer further, prepare and file a joint statement of issues by December 14, 2006, and, if any issues remained unresolved after that date, meet and confer again with a court reporter transcribing the discussion.¹ The court continued the hearing on the discovery motions to January 18, 2007. The parties later stipulated to extend both the time to file a joint statement of issues and the hearing on the discovery motions, and the court so ordered. The parties filed their 247-page joint statement of issues on January 26, 2007. The court continued the hearing on the motions to March 22, 2007.

CRC filed a motion for the appointment of a discovery referee in February 2007. CRC argued that the number and complexity of discovery disputes warranted the appointment of a referee to hear and determine all discovery disputes and to report findings and make recommendations to the trial court, pursuant to Code of Civil Procedure section 639, subdivision (a)(5). The trial court stated at the hearing on the

¹ The court stated at the conclusion of the hearing on November 9, 2006, “Don’t file anything else. Just work it out.”

motion on March 22, 2007, that it would appoint a discovery referee only if all parties agreed to the appointment. Callan's counsel objected to the appointment, so the court denied the motion. The court also continued the hearing on the discovery motions at that time, and later continued the hearing further.

5. *Tentative Ruling, Status Conference and Order on Discovery Motions*

The trial court issued a written tentative ruling before hearing the discovery motions on July 19, 2007. The tentative ruling neither discussed nor tentatively ruled on the motion to compel Callan's deposition. The parties argued at the hearing but barely mentioned the motion to compel Callan's deposition.² At the conclusion of the hearing, the court took the motions under submission and directed CRC's counsel to submit a proposed order for Callan to respond to and the court to consider. Callan's counsel asked whether he could also submit a proposed order in response to the proposed order submitted by CRC's counsel. The court responded, "Okay."

CRC submitted a proposed order on the discovery motions. Callan objected to CRC's proposed order and submitted her own proposed order. Defendants then filed a Request for Ruling on Remaining Issues Before the Court, identifying discovery disputes that purportedly were the subject of the pending motions but were not resolved in the tentative ruling. The Request for Ruling did not identify the motion to compel Callan's deposition as one of the unresolved issues. The Request for Ruling stated,

² The only reference at the hearing to the motion to compel Callan's deposition, by either counsel or the court, was the statement by CRC's counsel: "We've had a plaintiff who has no-showed for her deposition twice. We still have no order ordering her to appear."

however, that in addition to rulings on the unresolved issues, defendants were requesting “that the Court order the parties to meet and confer to set a comprehensive deposition schedule, with the exception of expert depositions,” and that if the parties were unable to agree on a schedule, “that they be ordered to return to the Court on August 14th at 10:00 a.m. for Court-ordered scheduling.”

Callan filed an opposition to the Request for Ruling, stating among other things that her lead attorney was then engaged in a trial that was expected to last beyond August 14, 2007, and that counsel should meet and confer to set a deposition schedule only after the completion of that trial.

The court conducted a conference call with counsel on September 6, 2007, in which the court directed Callan’s counsel to provide dates for Callan’s deposition. Callan’s counsel provided the dates of September 24 and 26, 2007, but later, upon learning that the court would require the mutual exchange of written discovery on October 1, 2007, claimed that he was not available on September 24 or 26. In another conference call on September 11, 2007, the court directed the parties to work from CRC’s proposed order on the discovery motions in preparing a joint proposed order, but Callan then submitted her own proposed order.³

The court conducted a status conference on discovery on September 19, 2007. The court stated that it intended to issue orders but was concerned about notice, and asked if the parties had any “notice issues.” Counsel for CRC stated that she would

³ These events were described in the order of April 2, 2008, granting the motions for terminating sanctions. The conference calls were not transcribed, and no minute order relating to the calls appears in the appellate record.

“reserve notice issues depending on the issue that arises in the course of our conversation.” The court stated that it would not proceed at that time if there were notice issues and ordered the parties to appear the following week, on September 24, 2007. The court ordered counsel to bring their “entire file” to court so that the court could review all discovery issues with counsel. The court stated that it intended to order “that depositions should occur after all of the paper discovery has been completed.” Plaintiff’s counsel then suggested that after the entry of an order on the pending discovery motions, the court should select and appoint a discovery referee.

The court stated at the status conference, “Well, what’s going to happen is, I’m going to get to the point where I understand that money doesn’t mean anything to either side so there are going to be issue sanctions. So I think the record is clear for any reviewing court that there’s a lack of cooperation on both sides.” The court stated that the parties should go straight to the jury room on the morning of September 24, 2007, to resolve the outstanding issues and that “each of you is ordered to place three phone calls to the other between now and then to try to resolve these issues.” The court stated further, “And there’s no doubt that any reviewing court is going to look at this history of this case and uphold any sort of sanction, any issue sanction that I ultimately will impose on either side.”

Counsel met in the jury room on the morning of September 24, 2007, and that afternoon presented the trial court with a jointly proposed order ruling on the pending discovery motions and on other discovery issues. The document was entitled Joint Proposed Order of Rulings at Hearing on July 19, 2007, and Subsequent Discovery

Management Issues. The proposed order stated that the written tentative ruling dated July 19, 2007, was adopted as the court's order on the discovery motions, except that the tentative ruling was amended in certain particulars. The proposed amendments to the tentative ruling were set forth in 13 enumerated paragraphs. Following those paragraphs was the heading "Subsequent Discovery Management Rulings" (capitalization and bold omitted). The paragraphs under that heading provided for the appointment of a discovery referee, set forth a "tentative schedule for depositions," and provided for the exchange of additional written discovery, among other provisions. The proposed deposition schedule included Callan's deposition commencing on November 12, 2007.

The proposed order stated regarding depositions:

"The parties agree to the following tentative schedule for depositions, and further agree that this list does not preclude the taking of other depositions on dates mutually agreed following the completion of this schedule. The parties reserve the right to object to or extend the actual duration of depositions once underway, and acknowledge that modification of the dates while leaving the following framework in place may be required.

"Constance Callan: November 12, 13, 2007; December 13, 14, 2007; January 9-11, 2008, in Los Angeles (estimated 6-8 days)."

The proposed order also listed several other depositions and the dates that they were to be taken.

The parties argued on the record concerning the meaning of paragraph 7 of the proposed order and whether it was consistent with the court's statements at the hearing on July 19, 2007. The court stated that it would sign the order, but that the parties could revisit any questions regarding paragraph 7 with the discovery referee. The court signed and filed the proposed order on September 24, 2007. The court also selected a discovery referee (Hon. Jon Mayeda, Ret.) and orally ordered his appointment "[p]ursuant to 638, and pursuant to stipulation of the parties." The court stated further, "he will determine how the parties will pay for his fees, and he'll make recommendations."

6. *Motion to Be Relieved as Counsel, the Discovery Referee's Stay of Discovery, Callan's Failure to Appear for her Deposition, and Other Events*

The parties signed a stipulation on October 31, 2007, to continue the dates for the mutual exchange of documents pursuant to the order of September 24, 2007, from November 1 and 2, 2007, to November 8 and 9, 2007. The stipulation stated that the continuance was necessary because Callan had indicated that she was unable to timely complete the exchange because recent fires in Malibu had caused her to evacuate her Malibu home. The stipulation stated, "All other dates remain unchanged." The court signed the stipulated order, which was filed on November 6, 2007.

Callan's attorneys filed a motion to be relieved as counsel on November 2, 2007. Her attorneys declared that Callan had refused to communicate with them, follow their advice, or pay their attorney fees. The hearing on the motion was scheduled for December 6, 2007.

The parties participated in a conference call with the discovery referee on November 7, 2007. According to a “Report and Order” later filed by the referee, Callan’s counsel informed the referee of the motion to be relieved as counsel and stated that Callan “for a number of reasons” would not appear for her deposition on November 12, 2007. The “Report and Order” stated that during the call, the referee “ruled that all discovery deadlines in the September 24, 2007 Order are stayed until the earlier of the December 6, 2007 hearing on the Motion to Be Relieved or the substitution of new counsel for Callan and Wheaton. All parties reserved and did not waive any rights with respect to bringing motions for sanctions for noncompliance with the September 24, 2007 Order.”

CRC filed an ex parte application on November 8, 2007, for an order vacating “all non-discovery dates” in the order of September 24, 2007. A declaration by CRC’s counsel stated that Callan’s counsel had informed her that a friend of Callan’s had told Callan’s counsel that Callan would not appear for her deposition on November 12, 2007. The declaration stated further that the discovery referee had stayed all discovery dates in the September 24 order, but that the defendants had reserved their rights to move for terminating sanctions if Callan failed to appear and testify at her deposition on November 12, 2007. The court denied the ex parte application.

Callan did not appear for her deposition on November 12, 2007. She also did not appear at the hearing on her attorneys’ motion to be relieved as counsel on December 6, 2007. Her attorneys stated that she did not oppose the motion but needed additional time to find new counsel. The court granted the motion. Counsel for CRC stated that

CRC intended to move for a terminating sanction based on Callan's failure to appear for her deposition. The court encouraged CRC to file the motion and scheduled a hearing on the motion for January 7, 2008.

7. *Motions for Terminating Sanctions*

CRC filed a motion for terminating sanctions on December 10, 2007, seeking to dismiss Callan's complaint with prejudice and strike her answer to CRC's cross-complaint. CRC argued that Callan's failure to appear for her deposition on November 12, 2007, violated both the order of September 24, 2007, and the order of November 6, 2007, and justified terminating sanctions. CRC also argued that Callan's failure to cooperate with her attorneys precipitated the motion to be relieved as counsel, which, together with her refusal to appear for her deposition on November 12, 2007, caused the discovery referee to stay all discovery and made it impossible for CRC to prepare for trial. CRC argued that Callan's failure to respond fully to its discovery propounded in August 2006 and thereafter and her persistent stonewalling and deception provided further support for terminating sanctions. Curtin and Houska also filed separate motions for terminating sanctions and joined in the motion by CRC.

Callan's new counsel filed a substitution of attorney on December 21, 2007. Callan, through her new counsel, opposed the motions for terminating sanctions. She argued that the stay order by the discovery referee justified her failure to appear for her deposition on November 12, 2007, and that she had produced her discovery responses as required by the order of September 24, 2007, while CRC had failed to produce its discovery responses as required by that order. She also argued at the hearing on the

motions for terminating sanctions that the reference to a discovery referee was a general reference, rather than a specific reference, and that the trial court therefore had no jurisdiction to rule on the motions for terminating sanctions.

The trial court granted the motions for terminating sanctions at the hearing on January 7, 2008, and asked counsel for CRC to prepare a proposed order. The court signed and filed an order granting the motions on April 2, 2008. In that order, the court stated that the failure to comply with an order to provide discovery is a misuse of the discovery process and may justify a terminating sanction, citing Code of Civil Procedure sections 2023.010 and 2025.450, subdivision (d). The court stated that the orders of September 24, 2007, and November 6, 2007, compelled Callan to appear for her deposition on November 12, 2007, that Callan failed to comply with those orders by failing to appear for her deposition on that date, and that her failure to comply was willful. The court concluded that the stay ordered by the discovery referee did not excuse Callan's failure to appear because the discovery referee ordered the stay in response to statements by Callan's counsel that made it clear that she had no intention of appearing for her deposition. The court also noted Callan's failure to appear for her deposition on other noticed dates and her incredulous excuses for failing to comply with her discovery obligations. The court stated further that for some time it had assumed that Callan's discovery motions were filed in good faith rather than for purposes of delay, but that it later realized that she had intentionally delayed the litigation to prevent defendants from defending themselves or prosecuting CRC's cross-complaint.

The court also cited several other instances in which Callan had failed to comply with its orders, “rulings,” or “directives”:

“The full record demonstrates that Callan violated the Court’s Orders, rulings and directives throughout this litigation, including the following: Despite the Court’s November 9th Order not to file any more discovery motions, Callan filed a motion to quash CRC’s subpoenas to third parties on January 5th and another motion to compel on February 28th. Neither of those motions was granted. On July 19, 2007 the Court ordered CRC to prepare the proposed order of the Court’s rulings. CRC timely did so, but Callan filed her own proposed order without the Court’s permission and in violation of the Court’s instructions. On September 6, 2007, the Court expressed its clear displeasure at Callan’s refusal to appear for deposition in the past, and directly instructed Callan to appear for deposition. The Court also specifically ordered Callan to provide dates for her deposition on September 10th. Callan did not provide those dates and refused twice more to appear for deposition. On September 11, 2007, the Court ordered the parties to work from Defendants’ July 26th proposed order to prepare a comprehensive joint discovery schedule, including a schedule for deposition and an October 1st exchange of agreed and Court-ordered discovery responses and documents. After Defendants submitted the joint order, Callan submitted her own, contradictory proposed order. She also manipulated the litigation calendar such that the Court-ordered October 1st production date passed, and her deposition was mysteriously set to follow the discovery exchange rather than precede it. On September 19, 2007, the Court ordered the parties to bring all of their files to her jury room on September 24th to

sit and meet, with her help as necessary, until all outstanding discovery issues were resolved with Court orders. Callan simply failed and refused to bring her case file. On March 22, 2007 and again on September 19, 2007, the Court stated specifically its intention to impose evidentiary sanctions against any party who took an unsupported position. Although Callan subsequently abandoned many of her unsupported positions, she persisted in others, and those discovery issues were ultimately resolved in Defendants' favor in the September 24th Order. Most recently, Callan failed and refused to appear for and testify at her deposition, in violation of the September 24th and November 6th Orders.”⁴

The court concluded that there was no indication that lesser sanctions would be effective, and that terminating sanctions were appropriate. The court therefore granted the motions for terminating sanctions, dismissed Callan's complaint with prejudice, and struck her answer to CRC's cross-complaint.

Callan timely appealed the order awarding terminating sanctions (No. B206505).

⁴ Several of the cited orders, rulings, and directives were vague, poorly documented, or find no support in the record. For example, what the trial court described in its order of April 2, 2008, as the “November 9th Order not to file any more discovery motions” was an oral order at the conclusion of a hearing on several discovery motions, stating only, “Don’t file anything else. Just work it out.” As another example, although the court ordered CRC to prepare a proposed order after the hearing on July 19, 2007, the court also orally approved a request by Callan's counsel for permission to submit a responsive proposed order, so the proposed order submitted by Callan was not “filed . . . without the Court's permission and in violation of the Court's instructions,” as stated in the order of April 2, 2008. As another example, the court's statements to Callan's counsel in the conference call on September 6, 2007, were neither transcribed nor memorialized in written order, despite the growing severity of the problem.

8. *Default Judgment*

The court clerk entered Callan's default on the cross-complaint on April 9, 2008. CRC filed a statement of damages that same day, claiming \$582,775 in compensatory damages and \$1,745,325 in punitive damages. The court later determined that the default had been entered prematurely and corrected the date of entry of default to June 23, 2008.

CRC filed a request for entry of a default judgment on its cross-complaint, seeking \$581,775 in compensatory damages and \$1,745,325 in punitive damages. CRC also sought \$299,349 in attorney fees based on an attorney fee provision in Callan's employment agreement. CRC submitted a proposed default judgment awarding \$2,327,100 (the sum of the requested compensatory and punitive damages), prejudgment interest on that amount from August 11, 2006 (the date of filing of the cross-complaint), \$299,349 in attorney fees, and \$5,709.10 in costs. The trial court signed and entered the default judgment on August 7, 2008.

Callan timely appealed the default judgment (No. B211059).

9. *Motion for Attorney Fees*

CRC filed a motion for attorney fees on August 22, 2008, seeking an award of over \$1.6 million in attorney fees incurred to defend against Callan's complaint. CRC argued that it was entitled to recover its attorney fees under Government Code section 12965, subdivision (b) as the prevailing defendant in a FEHA action. Curtin and Houska also moved for attorney fee awards under the same statute. Callan did not oppose the motions. The trial court granted the motions in an order filed on

December 19, 2008, awarding \$1,624,863.50 in fees to CRC, \$55,330 in fees to Curtin, and \$146,390 in fees to Houska.

Callan timely appealed the order awarding attorney fees (No. B213076). We have consolidated the three appeals.

CONTENTIONS

Callan contends (1) she did not willfully fail to comply with any order compelling discovery, and there is no other basis for the terminating sanctions; (2) the terminating sanctions are excessive; (3) the discovery referee acting under a general reference had exclusive jurisdiction to rule on discovery matters, so the trial court had no jurisdiction to impose the terminating sanctions for abuse of discovery; (4) the defendants are not entitled to attorney fee awards under FEHA because Callan's claims against them are not frivolous; and (5) the trial court had no authority to award damages on CRC's cross-complaint based on a statement of damages, and the statement of damages was untimely.

DISCUSSION

1. Standard of Review

We review an order imposing a discovery sanction for abuse of discretion. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted

in accordance with the governing rules of law. ‘ “The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]” [Citations.]’ [Citation.] A decision ‘that transgresses the confines of the applicable principles of law is outside the scope of discretion’ and is an abuse of discretion. [Citation.]” (*Ibid.*)

2. *The Terminating Sanctions Were Not Authorized by Statute*

The trial court imposed the terminating sanctions based primarily on its conclusion that Callan had willfully violated the orders of September 24, 2007, and November 7, 2007, and that a terminating sanction was an appropriate remedy for such a misuse of the discovery process. The court cited Code of Civil Procedure⁵ sections 2023.010 and 2025.450, subdivision (d) as authority for the imposition of terminating sanctions in these circumstances. We conclude that the Civil Discovery Act (§ 2016.010 et seq.) carefully delineates the circumstances in which nonmonetary sanctions are authorized under the Act and that any violation of the orders of September 24, 2007, and November 7, 2007, cannot justify the imposition of a terminating sanction.

Section 2023.030 authorizes a court to impose monetary, issue, evidence, terminating, and contempt sanctions “[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title.” This

⁵ All further statutory references are to the Code of Civil Procedure unless stated otherwise.

means that the authority to impose a discovery sanction under section 2023.030 depends upon and is limited by the authority granted in some other provision of the Civil Discovery Act (§ 2016.010 et seq.). (*New Albertsons, supra*, 168 Cal.App.4th at p. 1422.)

Section 2025.450 provides that a party that noticed a deposition “may move for an order compelling the deponent’s attendance and testimony, and the production for inspection of any document or tangible thing described in the deposition notice.” (*Id.*, subd. (a).) Subdivision (c)(1) requires the imposition of a monetary sanction if such a motion is granted, “unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.” Subdivision (d) then states, “If that party or party-affiliated deponent then fails to obey an order compelling attendance, testimony, and production, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010) against that party deponent or against the party with whom the deponent is affiliated. . . .”

We believe that “an order compelling attendance, testimony, and production,” within the meaning of section 2025.450, subdivision (d), refers to an order granting a motion under subdivision (a), that is, a motion “for an order compelling the deponent’s attendance and testimony, and the production for inspection of any document or tangible thing described in the deposition notice” (*id.*, subd. (a)). This construction seems compelling particularly in light of the language “If that party or

party-affiliated deponent *then* fails to obey an order” (*Id.*, subd. (d), italics added.)

This language indicates that the failure to obey an order described in subdivision (d) (i.e., “an order compelling attendance, testimony, and production”) temporally follows the issuance of an order described in subdivision (a) (i.e., an order granting a motion to compel the deponent’s attendance and testimony, and the production of documents and tangible things, under subdivision (a)).

Thus, a nonmonetary sanction can be imposed under subdivision (d) only if (1) the court previously found that the sanctioned party had failed to comply with its discovery obligations and, accordingly, granted a motion for an order compelling the deponent’s attendance and testimony, or production of documents and tangible things, under subdivision (a), and (2) the deponent then fails to comply with that order. These statutory requirements tend to promote an incremental approach to sanctions and provide some assurance that potentially severe nonmonetary sanctions “will be reserved for those circumstances where the party’s discovery obligation is clear and the failure to comply with that obligation is clearly apparent.” (*New Albertsons, supra*, 168 Cal.App.4th at p. 1423.)

The trial court here did not grant CRC’s motion to compel Callan’s deposition. The first paragraph of the jointly proposed order of September 24, 2007, ruling on the various discovery motions identified the motion to compel Callan’s deposition as one of several motions that were heard on July 19, 2007, but the order (and the prior tentative ruling incorporated in the order) did not mention that motion again and failed to rule on the motion. The court in the order of September 24 did not find that Callan had failed to

comply with a valid deposition notice or that her objections were invalid, and did not consider the imposition of a monetary sanction. (See § 2025.450, subds. (a), (c)(1).) The order of September 24 referred to the Callan deposition only in setting forth a “tentative schedule for depositions” pursuant to the parties’ agreement. The court’s order pursuant to the parties’ agreement with respect to the scheduling of depositions cast no blame on either party and was different in kind from an order granting a motion to compel a deponent’s attendance and testimony.

The stipulated order of November 6, 2007, bore even less resemblance to an order granting a motion to compel Callan’s attendance and testimony or production of documents or tangible things in a deposition. The order of November 6 only extended the time for the parties to exchange written discovery by one week and stated, “All other dates remain unchanged.” The order did not even mention Callan’s deposition.

We conclude that neither the order of September 24, 2007, nor the order of November 6, 2007, was “an order compelling attendance, testimony, and production” within the meaning of section 2025.450, subdivision (d), and that that any violation of those orders therefore cannot justify the imposition of terminating sanctions under the statute. In light of our conclusion, we need not decide whether the trial court’s determination that Callan willfully violated those orders was correct.

3. *Defendants Failed to Show Egregious Misconduct Sufficient to Justify the Termination Sanctions Absent Express Statutory Authority*

Some courts have held that nonmonetary sanctions for misuse of the discovery process may be imposed in exceptional circumstances in the trial court’s discretion,

even if the sanctions are not expressly authorized by statute. (*New Albertsons, supra*, 168 Cal.App.4th at pp. 1424-1426 [discussing cases].) The trial court here relied on sections 2030.130 and 2025.450, subdivision (d) in imposing the terminating sanctions and did not purport to hold that Callan's misconduct was so egregious as to justify the terminating sanctions in circumstances not expressly contemplated by those statutes. We therefore cannot affirm the order on this basis.

4. *Directions on Remand*

Our conclusion that the terminating sanctions were unauthorized, compels the reversal of the order granting the motions for terminating sanctions, the vacation of Callan's default on the cross-complaint, and the reversal of both the default judgment and the postjudgment order awarding attorney fees to the defendants as prevailing parties. Callan's other contentions challenging those rulings are moot.

The trial court in its order granting the motions for terminating sanctions described several instances of Callan's failure to comply with her discovery obligations and with the court's directives. The record also suggests that the defendants persisted in asserting unreasonable positions with respect to discovery and that the failure to cooperate in good faith in discovery was mutual. The trial court's efforts to encourage or enforce compliance with the parties' discovery obligations have been ineffective. We believe that this case requires more rigorous case management.

Accordingly, we will direct the trial court to order the parties to meet and confer to attempt to agree on a comprehensive schedule for all remaining depositions and the exchange of written discovery. If the stipulated dates are acceptable to the trial court,

the court must enter an order pursuant to the parties' stipulation. If the parties are unable to agree or the stipulated dates are unacceptable to the trial court, the court, with the assistance of the discovery referee, as appropriate, must promptly resolve any conflicts and enter an order establishing a comprehensive discovery schedule. For purposes of any further motions for nonmonetary sanctions, the discovery schedule ordered by the trial court shall be deemed an order on a motion "for an order compelling the deponent's attendance and testimony, and the production for inspection of any document or tangible thing described in the deposition notice" (§ 2025.450, subd. (a)), or the equivalent order on a motion to compel with respect to any other discovery method (e.g., §§ 2030.300, subd. (a) [interrogatories], 2031.310, subd. (a) [inspection demands] , 2031.320, subd. (a) [inspection demands], 2033.290, subd. (a) [requests for admissions]). Any failure to comply with the order may justify a monetary or nonmonetary sanction, as the court may determine in the exercise of its discretion.

DISPOSITION

The order of April 2, 2008, granting the motions for terminating sanctions by dismissing Callan's complaint with prejudice and striking her answer to CRC's cross-complaint is reversed with directions to the trial court to vacate Callan's default on the cross-complaint. The default judgment and the order of December 19, 2008, awarding attorney fees to the defendants are reversed. The trial court is directed to establish a comprehensive discovery schedule and conduct further proceedings consistent with the views expressed herein. Callan is entitled to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.